



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.DURAISWAMY

S.A.(MD)No.220 of 2011

Chelliah .. Appellant/Respondent/Plaintiff

Vs.

1.Chinnathangam

2.Mariappan .. Respondents/Appellants/Defendants

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 28.10.2010 passed in A.S.No.50 of 2007 on the file of the Subordinate Court, Thoothukudi, reversing the judgment and decree dated 31.01.2006 passed in O.S.No.324 of 2004, on the file of the Additional District Munsif Court, Thoothukudi.

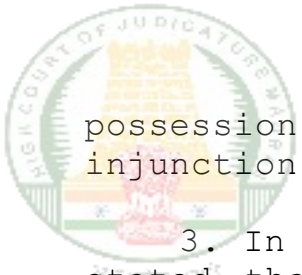
For Appellant : Mr.G.Prabhu Rajadurai

For Respondents : Mr.R.Vijayakumar

JUDGMENT

Challenging the judgment and decree passed in A.S.No.50 of 2007 on the file of the Subordinate Court, Thoothukudi, reversing the judgment and decree passed in O.S.No.324 of 2004, on the file of the Additional District Munsif Court, Thoothukudi, the plaintiff has filed the above Second Appeal.

2. The plaintiff filed the suit in O.S.No.324 of 2004 for permanent injunction. According to the plaintiff, he entered into a sale agreement with one Suresh John Vedanayagam on 09.08.1985 for purchasing the first item of the suit property. The plaintiff also contended that he paid an advance of Rs.2,000/- and he was put in possession of the first item of the suit property by the owner of the property viz., Suresh John Vedanayagam. Further the plaintiff has stated that after the execution of the sale agreement in the year 1985, the whereabouts of the said Suresh John Vedanayagam was not known to him and he is not in position to say that whether the said person is alive or not. It is not in dispute that the plaintiff purchased the second item of the suit property and also constructed a house in item No.2 of the suit property and is residing there. The plaintiff also obtained electricity connection for the second item of the suit property. Since the defendants tried to interfere with the plaintiff's



possession, the plaintiff has filed the present suit for permanent injunction.

3. In the written statement filed by the defendants, they have stated that the alleged agreement dated 09.08.1985 is a forged document. Further they have stated that at the time of applying for patta, the plaintiff has stated before the Authority that he orally purchased the property in the year 1972 itself. The defendants have stated that the owner of the property viz., Suresh John Vedanayagam is alive and is residing at 527, Hunter Avenue, Scotch Plains, New Jersey 07076, USA and therefore, the plaintiff should have made him as a defendant in the suit. The defendants also contended that the owner of the property executed a general power of attorney in favour of Samuvel Desh on 12.03.2001 and the said power of attorney Samuvel Desh executed a sale agreement in favour of one Suburam. According to the defendants, the plaintiff is not in possession of the suit property and only the original owner Suresh John Vedanayagam is in possession of the property.

4. Before the trial Court, on the side of the plaintiff three witnesses were examined and 11 documents viz., Exs.A.1 to A.11 were marked and on the side of the defendants, two witnesses were examined and 8 documents viz., Exs.B.1 to B.8 were marked. The trial Court, after taking into consideration the oral and documentary evidences let in by both parties, decreed the suit. Aggrieved over the judgment and decree of the trial Court, the defendant preferred an appeal in A.S.No.50 of 2007 and the lower Appellate Court reversed the judgment and decree of the trial Court and allowed the appeal. Aggrieved over the judgment and decree of the lower Appellate Court, the plaintiff has filed the above Second Appeal.

5. Heard Mr.G.Prabhu Rajadurai, learned Counsel appearing for the appellant and Mr.R.Vijayakumar, learned Counsel appearing for the respondents.

6. The appellant has raised the following Substantial Questions of Law in the Second Appeal:

"1. Whether the lower Appellate Court is correct in law in reversing the decree for bare injunction overlooking the insurmountable evidence showing the actual possession with the plaintiff, particularly when the defendants do not claim to be in possession of the suit property?

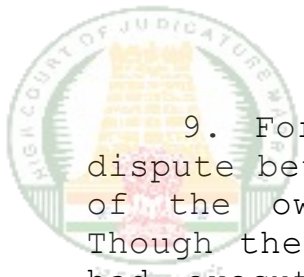
2. Whether the lower Appellate Court is correct in law in overlooking that defendant failed to examine a witness particularly when the suit is for bare injunction?



3. Whether the lower Appellate Court is correct in law in overlooking the failure on the part of the defendant in not producing the documents relied in his written statement?"

7. On a careful consideration of the materials available on record and the submissions made by the learned Counsel appearing on either side, it could be seen that one Suresh John Vedanayagam is the owner of the first item of the suit property. It is not in dispute that the second item of the suit property is in possession and enjoyment of the plaintiff. The plaintiff contended that the said Suresh John Vedanayagam executed a sale agreement dated 09.08.1985 in his favour for the purchase of the first item of the suit property. Further the plaintiff contended that he was put in possession of the suit property on the date of sale agreement and since then, he has been in possession and enjoyment of the same. The defendants contended that the alleged agreement dated 09.08.1985 is a fabricated document created by the plaintiff for filing the present suit. The alleged sale agreement was marked as Ex.A.1 before the trial Court. The plaintiff contended that after the execution of the sale agreement in the year 1985, the whereabouts of the owner of the property viz., Suresh John Vedanayagam is not known and he does not know whether he is alive or not. However in the written statement the defendants specifically stated that Suresh John Vedanayagam is very much alive and he is residing in USA. The defendants have also given his address in the written statement.

8. When there is a dispute with regard to the very execution of the sale agreement itself, the plaintiff should have made the original owner as a party in the suit. No doubt, in a suit for bare injunction, a suit may be filed as against a person who tries to encroach or trespass into the suit property. But when there is a dispute with regard to the very execution of Ex.A.1 document, on all fairness, the plaintiff should have made the owner of the property as a party. That apart, the defendants also claimed that the power agent of the owner of the property executed a sale agreement in favour of one Suburam, who is a close relative of the first defendant. In the absence of the owner of the property both parties claimed that two separate sale agreements were executed by the owner of the property as well as by the power agent of the owner of the property. Though the trial Court had decreed the suit finding that the plaintiff is in possession of the property, the lower Appellate Court had reversed the judgment and decree of the trial Court and allowed the appeal. It is also not in dispute that Item No.1 of the suit property is a vacant site. The learned Counsel appearing for the appellant submitted that the plaintiff had constructed a shed in the suit property during the pendency of



9. For the reason stated above, I am of the view that the dispute between the parties can be sorted out only in the presence of the owner of the property viz., Suresh John Vedanayagam. Though the defendants contended that the power agent of the owner had executed a sale agreement in favour of one Suburam, that document was not produced before the trial Court. In these circumstances in order to give an opportunity to both parties to let in fresh evidence, I am of the view that the matter can be remanded back to the trial Court for fresh consideration. The matter is remanded for the purpose of impleading the owner of the property as a defendant in the suit. Accordingly, the Substantial Questions of Law 2 and 3 are decided in favour of the appellant. The judgment and decree of the Courts below are set aside. The matter is remanded back to the Additional District Munsif Court for fresh consideration. The plaintiff is directed to file a petition to implead the owner of item No.1 of the suit property as a defendant in the suit within a period of three weeks from the date of receipt of a copy of the judgment.

10. The learned Counsel for the respondents/defendants has no objection for allowing the impleading application to be filed by the plaintiff before the trial Court. Hence, the trial Court shall allow the impleading application to be filed by the plaintiff and get along with the matter and the parties are at liberty to let in oral and documentary evidences to substantiate their respective case. After taking into consideration the oral and documentary evidences, the trial Court is directed to decide the matter afresh on merits and in accordance with law within a period of four months from the date of allowing the impleading application. The parties shall appear before the trial Court on 20.02.2017.

11. With these observations, the Second Appeal is allowed. There shall be no order as to costs.

Sd/-

Assistant Registrar(RTI)

/True Copy/

Sub Assistant Registrar

To

1. The Subordinate Judge, Thoothukudi.
2. The Additional District Munsif, Thoothukudi

Copy to: The Record Keeper, VR Section,
Madurai Bench of Madras High Court, Madurai.

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