



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED :14.08.2013

CORAM

THE HONOURABLE MR.JUSTICE A.SELVAM

SECOND APPEAL No.352 of 2011

and

M.P.(MD)No.1 of 2011

G.Marimuthu

.. Appellant/Appellant
Defendant

Vs.

Ananthan, S/o.Govindaraj

.. Respondent/Respondent
Plaintiff

Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 against the Judgment and decree dated 13.04.2010 passed in Appeal Suit No.57 of 2008 by the Principal Sub-Court, Kumbakonam, confirming the Judgment and decree dated 30.04.2008 passed in Original Suit No.112 of 2007 by the II-Additional District Munsif Cum Judicial Magistrate, Kumbakonam.

For Appellant : Mr.R.Devaraj

For Respondent: Mr.G.R.Swaminathan

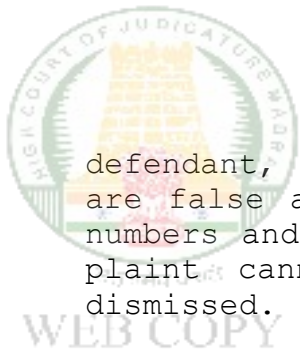
JUDGMENT

The concurrent Judgments and decrees passed in O.S.No.112 of 2007 by the II-Additional District Munsif cum Judicial Magistrate Court, Kumbakonam and in Appeal Suit No.57 of 2008 by the Principal Sub-Court, Kumbakonam, are being challenged in the present second appeal.

2.The respondent herein as plaintiff has instituted Original Suit No.112 of 2007 on the file of the trial Court for the relief of permanent injunction so as to restrain the defendant from putting up any new construction in the suit properties which are in his possession and enjoyment, wherein the present appellant has been shown as sole defendant.

3.It is averred in the plaint that the suit properties are comprised in S.Nos.136/1B and 136/1D. The plaintiff, defendant and their brother by name Radhakrishnan have purchased each 1/3rd share in the suit survey numbers. The suit property has been shown in the plaint plan as 'ABCD'. The plaintiff is in possession and enjoyment of the said portion and now the defendant is trying to put up new construction and under the said circumstances, the present suit has been instituted for the relief sought for in the plaint.

4.In the written statement filed on the side of the



defendant, it is averred that the entire averments made in the plaint are false and the defendant has been enjoying the entire suit survey numbers and under the said circumstances, the relief sought for in the plaint cannot be granted and therefore the suit deserves to be dismissed.

5. On the basis of the rival pleadings raised on either side, the trial Court has framed necessary issues and after analysing both the oral and documentary evidence has decreed the suit as prayed for. Against the Judgment and decree passed by the trial Court, the defendant as appellant has preferred Appeal Suit No.57 of 2008 on the file of the first appellate Court. The first appellate Court, after hearing both sides and upon reappraising the evidence available on record, has dismissed the appeal and thereby confirmed the Judgment and decree passed by the trial Court. Against the concurrent judgments and decrees passed by the Courts below, the present second appeal has been preferred at the instance of the defendant as appellant.

6. As agreed by the learned counsel appearing for both sides, the present second appeal is disposed of on merits at the stage of admission.

7. On the side of the appellant/defendant, the following substantial questions of law have been raised for consideration.

"i. Whether the suit for injunction filed by the respondent is maintainable without the relief of declaration and recovery of possession?

ii. Whether the non-appointment of approved surveyor to measure the property is not fatal to the reliefs sought for in the suit?

iii. Whether the appellant to his convenience is not entitled to do any repair or alter the superstructure belongs to him as admitted by the respondent?"

8. The learned counsel for the appellant/defendant sparingly contended that even in the plaint it is specifically admitted that the defendant is one of the co-owners of the suit survey numbers 136/1B and 136/1D and further in has been clearly admitted that the defendant is in possession and enjoyment of the suit property and under the said circumstances the proper remedy which is available to the plaintiff is only to file a comprehensive suit for partition but the present suit has been instituted for getting the relief of permanent injunction and the Courts below, without considering the nature of right that exists in favour of the plaintiff and defendant and their brother by name Radhakrishnan, have erroneously rejected the defence put-forward on the side of the appellant/defendant and therefore the concurrent judgments and decrees of the courts below are liable to be interfered with.

<https://hcservices.ecourts.gov.in/hcservices/> 9. Per contra, learned counsel appearing for the respondent/plaintiff has contended that the present suit has been instituted in respect of the portion which has been described as 'ABCD'



and the same forms part of suit survey Nos.136/1B and 136/1D and further both the plaintiff and defendant as well as their brother by name Radhakrishnan are each 1/3rd share of suit survey numbers 136/1B and 136/1D and since the defendant has tried to put up new construction in the portion described as 'ABCD' in the plaint plan, the present suit has been instituted for the relief sought for therein and the Courts below, upon considering the nature of the relief sought for, has rightly rejected the defence put-forward on the side of the appellant/defendant and therefore the concurrent judgments and decrees passed by the courts below do not warrant interference.

10.It is an admitted fact that the suit property, which has been shows as 'ABCD' in the plaint plan is comprised in suit survey Nos.136-1B and 136-1D. In the plaint, it has been specifically averred that the plaintiff, defendant and their brother by name Radhakrishnan are each 1/3rd share of entire extent of old Survey No.136. The present suit has been instituted for the relief of permanent injunction so as to restrain the defendant from putting up any new construction in the portion described as 'ABCD'.

11.On the basis of the averments made in the plaint, it is easily discernible that the plaintiff, defendant and their brother by name Radhakrishnan have become co-owners of the suit survey numbers 136/1B and 136/1D. Since all of them are co-owners of the suit survey numbers, the relief sought for in the present suit is totally unwarranted and the proper remedy which is available either to the plaintiff or to the defendant is to file a comprehensive suit for partition. Since filing a partition suit is the only way for giving quietus to the parties and since the relief sought in the present suit is totally unwarranted, this Court is of the view that the relief sought for in the present suit need not be granted.

12.The Courts below, without considering the nature of the claim put-forward on the side of the plaintiff as well as the defendant, have erroneously rejected the defence put-forward on the side of the defendant. Under the said circumstances, the concurrent judgments and the decrees passed by the courts below are liable to be set aside and all the substantial questions of law raised on the side of the appellant/defendant are really having substance.

13.In fine, the second appeal is allowed, without costs. The concurrent judgments and decrees passed by the courts below are set aside and the original suit in O.S.No.112 of 2007 is dismissed, without costs. The plaintiff is directed to file a suit for partition so as to get remedy once for all. No costs. Connected M.P.(MD)No.1 of 2011 is closed.

Sd/-

Assistant Registrar(Crl.Side)

/True Copy/

Sub Assistant Registrar



1.The Principal Subordinate Judge,
Kumbakonam, Thanjavur District.

2.II-Additional District Munsif cum
Judicial Magistrate,
Thanjavur District.

+1cc to Mr. G.R.Swaminathan, Advocate (Sr.No.40874)

gb

AA/30.09.2013/4p -4c/

Judgment in
S.A (MD) No.352 of 2011
and
M.P. (MD) No.1 of 2011

Dated:14.08.2013