



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 29.11.2016
CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

WEB COPY

S.A(MD)Nos.280 and 281 of 2013
and
M.P. (MD).No.1 of 2013 in S.A. (MD).No.280 of 2013
and
M.P. (MD).Nos.1 and 1 of 2014
in
S.A(MD)Nos.280 and 281 of 2013

S.Stephen

... Appellant/Respondent/Defendant in
Second appeal No.280/13 and Appellant/
Appellant/Defendant in S.A.NO.281/13

-Vs-.

1.S.John Isidore (died)
2.Therasa Rani
3.James Alexis Raj
4.Sahaya Shalini

**(Respondents 2 to 4 brought as Lrs of deceased
sole respondent as per the orders of Court dated
13.10.2015 made in M.P. (MD).No.1 of 2015 in
S.A. (MD).No.280 of 2013)**

...Respondent/Respondent/
Appellant/Plaintiff in SA(MD)NO.280/13.

1.S.John Isidore (died)
2.Therasa Rani
3.James Alexis Raj
4.Sahaya Shalini

**(Respondents 2 to 4 brought as Lrs of deceased
sole respondent as per the order of Court dated
13.10.2015 made in M.P. (MD).No.1 of 2015 in
S.A. (MD).No.281 of 2013)**

...Respondent/Respondent/Plaintiff
in S.A. (MD).281/2013

PRAYER in S.A(MD).280/2013: Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the Judgment and Decree passed by the learned Principal Subordinate Judge, Trichirapalli in A.S.No.135 of 2012 dated 11.12.2012 reversing the Judgment and Decree passed by the learned II Additional District Munsif Court, Trichirappalli in O.S.No.164 of 2008 dated 25.11.2011.

PRAYER in S.A(MD).281/2013: Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the Judgment and



Decree passed by the learned Principal Subordinate Judge, Trichirapalli in A.S.No.141 of 2012 dated 11.12.2012 reversing the Judgment and Decree passed by the learned II Additional District Munsif, Trichirappalli in O.S.No.366 of 2000 dated 25.11.2011. In both S.As:

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For Appellant : Mr.J.Barathan
For Respondents : Mr.A.Haja Mohideen

COMMON JUDGMENT

These second appeals have been filed by the defendant in the suits in O.S.Nos.366 of 2000 and 164 of 2008 on the file of the learned Second Additional District Munsif Court, Trichirappalli.

2. The first suit in O.S.No.366 of 2000 is for permanent injunction, restraining the appellant herein from in any way demolishing or remodelling the suit house and for permanent injunction restraining the defendant from creating any encumbrance in the suit property and the second suit in O.S.No.164/2008, was for declaration of the title of the plaintiffs over the ground floor of the suit house and for a consequential injunction restraining the defendant from interfering with the plaintiff's possession. The suit is also for declaration of title and for recovery of possession in respect of the upstairs portion of the suit house. In both the suits, the defendant is one and the same. The respondent claimed right in respect of the suit property, on the basis of a registered Will alleged to have been executed by one Soosaiammal, grandmother of the plaintiff.

2.1.According to the plaintiff/respondent, his grandmother executed the said Will with a direction that the suit property shall be taken by any one of her three sons, after making cash payments to other sons and three other daughters.

2.2:According to the plaintiff/respondent, his father died on 29.08.1981, leaving behind the plaintiff and the defendant and another son by name Justin and three daughters. It is also admitted that the said Soosaiammal died on 17.04.1992. Though it is not disclosed in the plaint, it is admitted that another son of Soosaiammal also died before the death of Soosaiammal. It was the further case of the plaintiff/respondent that pursuant to a settlement, among the family members, a consent letter was given by the defendant and other brothers and sisters of the plaintiff on 02.09.1981, acknowledging the absolute right of the plaintiff. Though the plaintiff admitted that the defendant is residing in the upstairs portion, it was pleaded that the defendant is in permissive possession. According to the plaintiff, the other <https://hcservices.courts.mca.gov.in/hcservices/> Soosaiammal executed a document on 31.10.1990 acknowledging the receipt of some payments. Since the plaintiff is the absolute owner, the plaintiff pleaded that he is entitled



to the injunction as prayed for.

2.3: The suit was contested by the appellant on many grounds. When the said first suit was pending, the second suit came to be filed for declaration of title and for consequential injunction and also for recovery of possession in respect of the upstairs portion of the suit property. The execution of the Will dated 25.10.1980, the consent letter and the document dated 31.10.90 were specifically denied by the defendant. In the context, the appellant also took a specific plea that the second suit is barred under the principles of Order 2 Rule 2 of the Civil Procedure Code. Both the suits were decided by a common judgment. The trial Court decreed the suit filed for injunction in O.S.No.366 of 2000 and dismissed the suit in O.S.No.164 of 2008, filed for declaration of title and recovery of possession in respect of the upstairs portion of the suit property and for permanent injunction in respect of the remaining portion of the suit property.

2.4: Aggrieved by the findings of the trial court, both the plaintiff as well as the defendant preferred two appeals before the appellate court in A.S.Nos.135 and 141 of 2012.

3. The Appellate Court, however, dismissed the appeal filed by the appellant in A.S.No.141 of 2012 and allowed the appeal in A.S.No.135 of 2012, filed by the respondent. Hence, aggrieved over the same, these two second appeals have been filed by the defendant in the suit.

4. Heard the learned counsel for the appellant and respondent.

5. The substantial questions of law raised by the counsel for appellant before this Court in these second appeals are:

a) Whether the second suit is barred in view of Order 2 Rule 2 of C.P.C?

b) Having regard to the specific stand that was taken by the plaintiff that he is entitled to the suit property as per the Will under Ex.A.1 and the unregistered and unstamped deed/Ex.A.3, i) whether the plaintiff is entitled to title to the suit properties despite Section 106 of the Indian Succession Act, 1925 and ii) Whether the plaintiff is entitled to any right on the basis of Ex.A.3, when the document/Ex.A.3 is an unregistered and unstamped document, which is inadmissible and would not confer any right in favour of the plaintiff.

6. The prayer in the first suit in O.S.No.366 of 2000 is for permanent injunction restraining the defendant from demolishing the suit house and for restraining the defendant from creating any encumbrance over the suit property. Since the first suit was filed only for bare injunction on the

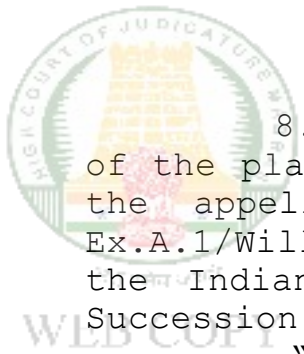
same cause of action it is true that the plaintiff is precluded from filing the second suit in view of Order 2, Rule 2 of C.P.C. Order 2, Rule 2 of C.P.C. reads as follows:

" Suit to include the whole claim: (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.

2. Relinquishment of part of claim: Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

3. Omission to sue for one of several reliefs:- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

7. It is to be noted that the plea of bar under Order 2, Rule 2 was not specifically raised before the trial Court. The second suit is filed two years after the filing of the first suit and the second suit for declaration of title and consequential relief would no doubt impermissible as the cause of action is one and the same. The plaintiff is not entitled to seek different reliefs in successive suits on the same cause of action. However, from the reading of the paragraph 10 of the plaint in the first suit, the plaintiff has stated that he is taking separate action to recover the possession of the upstairs portion of the suit house from the defendant. Had there been a plea before the trial Court with reference to Order 2, Rule 2, the plaintiff would have an opportunity to seek permission from the Court for withdrawal of the first suit without prejudice to his right to prosecute the subsequent suit where the relief is substantial. In such circumstances, though the plaintiff who had a cause of action for filing the suit for declaration cannot support his claim for filing two different suits having regard to the fact that the plaintiff had lost an opportunity to sustain the second suit by withdrawing the first suit with the leave of the Court to prosecute the second suit, I am of the view that the plea by relying upon Order 2, Rule 2 need not be entertained at this stage. It is also seen that no such issue was raised before the trial Court or the appellate Court. Even in the grounds of appeal the plea under Order 2, Rule 2 is not specifically raised. Further, the trial Court tried both suits together and the two appeals were also disposed of by a common judgment. Hence, there was no prejudice that was caused to the defendant. However, the plaintiff would be seriously prejudiced if the bar under Order 2, Rule 2 is considered at the second appellate stage. Hence, the plea under Order 2, Rule 2 is not entertained.



8. With regard to the second issue as to the entitlement of the plaintiff to declaration of title, the learned counsel for the appellant pointed out that the plaintiff's claim under Ex.A.1/Will cannot be sustained, having regard to Section 106 of the Indian Succession Act, 1925. Section 106 of the Indian Succession Act reads as follows:

"106: Legacy does not lapse if one of two joint legatees die before testator:- If a legacy is given to two persons jointly, and one of them dies before the testator, the other legatee takes the whole."

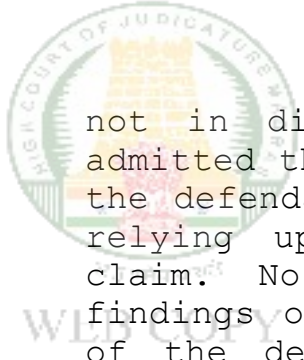
9. Admittedly, in the present case, the properties of Soosaiammal has to be taken by all the three sons. However, it is admitted that the two sons pre-deceased Soosaiammal. In such circumstances, the legal heirs of the pre-deceased sons of Soosaiammal have no right under the Will. In the present case, admittedly, the plaintiff is the grand-son of Soosaiammal through her pre-deceased son by name Stanislaus. In the said circumstances, the plaintiff's title cannot be upheld on the strength of the Will as claimed by the plaintiff.

10. The second source of title for the plaintiff is the document/ Ex.A.3, which is nothing but an unregistered and unstamped partition deed and the consent letter alleged to have been executed by the defendant and others in favour of the plaintiff. The consent letter is disputed by the defendant on the ground it is a rank forgery. The unregistered and unstamped family arrangement, by which partition or conveyance is effected cannot be relied upon for any purpose and it is settled that such document will not confer any right in favour of the plaintiff to establish his title. Further Soosaiammal, the owner of the property is also a signatory. Hence, this document has to be treated as a conveyance. Since this document is neither registered nor duly stamped, it cannot be relied upon even for a collateral purpose.

11. The document/ Ex.A.2 dated 02.09.1981, though construed as a consent letter by the plaintiff, it is a document, whereby all of the brothers and sisters of the plaintiff have agreed to relinquish their right in favour of the plaintiff. It is pertinent to mention that it is under this letter, others have expressed their assurance for the plaintiff to get the property. This document can never be construed as a family arrangement as this document was executed during the lifetime of Soosaiammal, when no one had any right over the property.

12. Having regard to the contents of Ex.A.2, I am of the view that the plaintiff cannot get a right under this document, as this document, is not valid in law. If it is treated as an agreement, the same can only be enforced by a manner known to law. In such circumstances, the document/A.2 cannot be relied upon to hold the claim of title in favour of the plaintiff.

<https://hcservices.ecourts.gov.in/hcservices/> is admitted that the defendant is only in possession of the upstairs portion of the suit property. The plaintiff's possession in respect of the first floor portion is



not in dispute. The defendant in the written statement has admitted that the plaintiff is occupying the ground floor. Though the defendant set up title in respect of the entire suit property relying upon another Will, the appellate Court negatived his claim. No argument was advanced before this Court challenging the findings of the lower appellate Court to advance exclusive title of the defendant in respect of the whole property. In such circumstances, the plaintiff is entitled to permanent injunction in respect of the ground floor portion of the suit house. However, he is not entitled to any relief over the upstairs portion of the suit property. Hence, the suit in O.S.No.366 of 2000 on the file of the II Additional District Munsif Court, Trichy, is decreed only in respect of the ground floor portion of the suit property. Similarly, the suit in O.S.No.164 of 2008 is decreed only in respect of the ground floor portion and the suit for declaration of title and recovery of possession in respect of the upstairs portion is dismissed. The judgment and decree of the lower appellate Court in A.S.No.135 and 141 of 2012 are set aside and these Second Appeals are allowed only to the extent by decreeing the suit partly in favour of the plaintiff in respect of the ground floor portion in the suit house. Consequently, connected miscellaneous petitions are closed. There shall be no order as to costs.

Sd/-
Assistant Registrar(CS II)

/TRUE COPY/

Sub Assistant Registrar

To

- 1.The II Additional District Munsif Court, Trichirappalli
- 2.The Principal Subordinate Judge, Trichirapalli.

COPY TO:

The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

- +1 cc to MR.T.R.JEYAPALAM, ADVOCATE, SR NO:398
- +2 cc to MR.A.HAJA MOHIDEEN, ADVOCATE, SR NO: 300&301

VS

AAM SV MMS 17.02.2017 6P 7C

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