

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.12.2018

C O R A M

THE HONOURABLE Ms.JUSTICE P.T.ASHA

A.S.No.438 of 2011

Savithri,
W/o.Kaliaperumal,
Rep. by its Power Agent
K.Kalimuthu @ Muruganandam,
S/o.Kaliaperumal,
Thirunallar Road, Karaikal. Plaintiff/Appellant

Vs.

1. Bhanumathi (died)
W/o.Ramadoss,
No.1, Pushpa Nagar, Thirunallar Road,
Karaikal.
2. Ramadoss,
S/o.Govinda Pillai.
3. Prakash,
S/o.Ramadoss,
4. Ashok,
S/o.Ramadoss,
Residing at Nagore Salai,
Mullaiyar Bridge and Navin Gas Station,
Akkaravattam Post, Neravy Commune,
Karaikal. ... Defendants/Respondents

(RR 2 to 4 brought on record as LRs of the deceased sole respondent viz., Banumathi vide order of Court dated 05.10.2018 made in M.P.No.2 of 2015 in AS.No.438 of 2011)

Prayer: First Appeal is filed under Section 96 read with Order 41 Rule 2 of Civil Procedure Code, praying against the judgment and decree of the District Court, Karaikal, dated 11.03.2011 in O.S.No.60 of 2009.

For Appellant : Mr.S.Sounthar
For R2 to R4 : Mr.A.Kumara Raja
For R1 : Died

J U D G M E N T

The above First Appeal has been filed by the unsuccessful plaintiff in a suit filed for the following relief:-

"For delivery of possession of the deficit extent of the suit property to the plaintiff by the defendant"

2. The case of the plaintiff is that the plaintiff had purchased an extent of 3 mahs and 50 kuzhies in the total extent of 6 mahs from the defendant in R.S.No.193/2 under a registered sale deed dated 30.03.2008. The southern neighbour was one Mr.Veerapandian. Admittedly, the said Veerapandian, the defendant and the plaintiff all claim title over the property from the siblings Mr.Kaderhassan, Mr.Haja Mohamed and Fathima Ummal. It is the case of the plaintiff that after she purchased the land, the said Veerapandian had laid a fence and taken away a portion of the property purchased by the plaintiff and therefore, the plaintiff asked the defendant to make good the deficit extent. Since there was no compliance, a legal notice dated 20.08.2009 was also issued requesting the defendant to measure the land and give the deficit extent from the land situated in the Northern side, which is lying vacant. The legal notice was also unanswered, constraining the plaintiff to proceed with the suit.

3. The defendants, on entering appearance, had filed a written statement inter alia contending that the suit is bad for non-joinder of the said Veerapandian who ever according to the plaintiff had encroached into an extent of 3 mahs and 50 Kuzhies in the property sold to the plaintiff. The case of the defendant is that she has purchased the 'A' schedule property from Haja Mohamed under sale deed dated 08.02.2005 and these properties was sold to the plaintiff and she had taken possession on the very same date. The fence had been put up by said Veerapandian nearly 1½ years after the property was sold to the plaintiff and therefore, there is no cause of action for filing the suit against the defendant. The remedy of the plaintiff lies only against the Veerapandian for recovery of the possession. The defendant had further contended that even assuming without admitting that the allegations made in the plaint were true, the only remedy of the plaintiff lay in the form of damages. The defendant would contend that she was entitled to total extent of 16 mahs and 54 Kuzhies in

R.S.No.193/2. It was also her case that Veerapandian had purchased an extent of 4 mahs and 12 kuzhies from Famitha Ummal and in fact, the sale had been objected to by the defendant since the Famitha Ummal had no right over the said extent. The defendants therefore sought for dismissal of the suit.

4. The parties had gone to the trial and the learned District Judge, Karaikal had framed four issues as to whether:-

- a). There was no cause of action.
- b). Whether the suit is bad for non-joinder of the necessary parties.
- c). Whether the defendant was liable to handover the deficit extent to the plaintiff.
- d). Whether the plaintiff is entitled for the decree for recovery of possession.

5. The plaintiff did not enter the box and it was her son who had adduced evidence on her behalf and she had marked the Ex.A.1 to Ex.A.7 in support of her case. The defendant had examined himself as DW.1, however, she had not filed any document in support of her case.

6. The trial Court had returned the finding with reference to the first issue that the plaintiff had a cause of action for instituting the suit. However, the 2nd issue was answered against the plaintiff wherein, the learned Judge, had held that the suit was bad for non-joinder of the necessary parties particularly, the said Veerapandian against who the allegations had made by the plaintiff. In view of this issue being answered against the plaintiff all other issues followed the suit and was answered against the plaintiff. Therefore, the suit has been dismissed primarily on the ground of non-joinder of the necessary parties.

7. Heard Mr.Sounthar learned counsel for the appellant and Mr.A.Kumara Raja, learned counsel for the respondents 2 to 4.

8. The learned counsel for the appellant would argue on the issue of non-joinder stating that the learned Judge was in

error in dismissing the suit on the ground of non-joinder totally overlooking the provision of Order I Rule 9 of the Civil Procedure Code. He would therefore urge this Court to remit the matter so as to enable the plaintiff to rectify this defect and the parties thereafter to get on their case.

9. The learned counsel for the respondents has opposed the said submission stating that by seeking a remand, the plaintiff would try to develop on her case and this cannot be permitted and therefore the Appeal should be dismissed.

10. The only point that arises for consideration in the above first appeal is: whether the dismissal of the suit on the ground of non-joinder is against the provision of Order I Rule 9 of the Code of Civil Procedure?

11. Before proceeding to discuss this issue, it is necessary to extract the said provision which reads as follows:-

Mis-joinder and non-joinder.- No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

[Provided that nothing in this rule shall apply to non-joinder of a necessary party]

12. Admittedly, the plaint proceeds on the following lines:-

"One Mr.Veerapandian has purchased the property in the same R.S.No.193/2 on the Southern side of the property purchased by the plaintiff, has recently laid a fence claiming that a portion of the property purchased by Mr.Veerapandian is in the occupation of the plaintiff. The plaintiff having purchased an extent of 80 Ares 27 Contiares in R.S.No.193/2 is not having the full extent and a portion has been taken away by Mr.Veerapandian who has also purchased the property from one Fathima Ummal."

13. Further, in the cause of action paragraph namely (iv) one of the cause of action is that on 01.08.2009, the

southern portion of an extent 3 mahs and 50 Kuzhies has been taken away by Veerapandian by putting a fence. Therefore, the entire pleadings proceed on the basis that Mr.Veerapandian had encroached and taken away the property. This factum was also brought to the notice of the plaintiff by the defendant in her written statement wherein, she had specifically pleaded as follows:

"The suit as framed by the plaintiff is bad in Law on her own showing the Plaintiff's compliant is that one Mr.Veerapandiyan, had encroachment upon an extent of 3 Mahs and 50 Kuzhies in the total extent of 6 mahs sold to the plaintiff by this defendant under a registered sale deed dated 30.03.2008."

14. Despite such a categoric defence being put forward as early as on 18.01.2010, no steps whatsoever has been taken by the plaintiff to implead said Veerapandian. Admittedly, the said Veerapandian is a necessary party to the proceedings therefore, considering the proviso to Order 1 Rule 9 of Civil Procedure Code, the failure on the part of the plaintiff, to implead him is fatal to the suit. I do not find infirmity in the judgment and decree passed by the Learned District Judge, Karaikal. Therefore, the First Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

bsm
To

The District Court,
Karaikal.

+1cc to M/S.S.Sounthar, Advocate Sr.83279

+1cc to M/S.A.KumaraRaja, Advocate Sr.83142

A.S.No.438 of 2011

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srg 21/01/2019