

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.361 of 2018

- 1.Jagannathan
- 2.Suresh
- 3.Ramesh
- 4.Gopi

.. Appellants/Appellants/Defendants

Vs.

Enuru Illavari Baliya Dharma Choultry,
Rep. by its Trustee Mr.M.G.Jayaraman,
Kavarai Street, Muthiyalpettai Village,
Kancheepuram Taluk.

.. Respondent/Respondents/Plaintiff

PRAYER: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 09.10.2017 made in A.S.No.31 of 2009 on the file of the Sub Court, Kancheepuram, confirming the judgment and decree dated 27.06.2006 made in O.S.No.950 of 1995 on the file of the Principal District Munsif Court, Kanchipuram.

For Appellants : Mr.Perumbulavil Radhakrishnan

J U D G M E N T

Second Appeal is filed against the judgment and decree dated 09.10.2017 made in A.S.No.31 of 2009 on the file of the Sub Court, Kancheepuram, confirming the judgment and decree dated 27.06.2006 made in O.S.No.950 of 1995 on the file of the Principal District Munsif Court, Kanchipuram.

2.The appellants are defendants who lost in both the Courts below and respondent is the plaintiff in O.S.No.950 of 1995 on the file of the Principal District Munsif Court, Kanchipuram. The respondent filed the said suit for recovery of possession of suit property from the appellants after removing the superstructure put up by the appellants at the time of delivery of possession. According to the respondent, he is owner of the suit property described in the suit schedule along with other properties in Town Survey Nos.45/1, 45/2 and 45/3. One

Kishtapillai, father of the appellants was a tenant under the respondent as per the lease deed dated 22.06.1973 on a monthly rent of Rs.10/- and put up a cattle shed. The respondent obtained decree of possession against the said Kishtapillai by filing O.S.No.195 of 1977 on the file of the District Munsif Court, Kanchipuram. The said suit was decreed after contest. The appeal, A.S.No.240 of 1978 filed by the said Kishtapillai before the Sub Court at Kanchipuram was also dismissed. The respondent filed Execution Petition, but they could not take delivery due to technical reasons. The appellants, denying title of the respondent, filed O.S.No.896 of 1995 for an injunction against the respondent. The appellants are estopped from denying the title of the respondent and claim of the appellants is untenable. Hence, the respondent filed suit for the relief stated above.

2(a).The 3rd appellant filed written statement which was adopted by appellants 1, 2 and 4 and contended that suit property does not belong to the respondent, but it is a land belonging to the Kanchipuram Municipality. The appellants are in possession of the property in Survey No.44 which belongs to the Kanchipuram Municipality. Originally, the appellants' father, Kishtapillai occupied backyard of the suit property for a long time. He also encroached the property in Survey No.44 which belongs to the Kanchipuram Municipality. After the judgment in A.S.No.240 of 1978, their father handed over the backyard of the suit property to the respondent and continued his possession in Survey No.44. Subsequently, the appellants are in possession and enjoyment of the property in Survey No.44.

2(b).The 3rd appellant also filed additional written statement and contended that the suit is barred by limitation and on the principles of resjudicata, suit has to be dismissed in-limine. The appellants are enjoying the property for more than 15 years after disposal of A.S.No.240 of 1978.

3.Based on the above findings, the learned Trial Judge framed necessary issues. Before the learned Judge, one Jayaraman was examined on behalf of the respondent as P.W.1 and 10 documents were marked as Exs.A1 to 10. The report of the Advocate Commissioner and plan were marked as Court exhibits viz., Exs.B1 and B2. The appellants did not let in any oral and documentary evidence.

4.The learned Judge considering the pleadings, oral and documentary evidence, decreed the suit, holding that suit property belongs to the respondent and appellants failed to prove that property belongs to the Kanchipuram Municipality.

5.Against the said judgment and decree dated 27.06.2006, made in O.S.No.950 of 1995, the appellants filed A.S.No.31 of

2009. The learned I Appellate Judge framed necessary points for consideration. The learned I Appellate Judge considering the materials on record, judgment of the Trial Court and arguments of the counsel for the parties, dismissed the Appeal, confirming the judgment of the Trial Court.

6. Against the said judgment and decree dated 09.10.2017 made in A.S.No.31 of 2009, the appellants have come out with the present Second Appeal.

7. The learned counsel for the appellants contended that the appellants are in possession and enjoyment of the property in Survey No.44, which belongs to the Kanchipuram Municipality. The respondent failed to prove that the suit property belongs to them and the extent of land is owned by them. The respondent has not produced any field sketch or taken steps for appointment of Commissioner to identify the suit property. The respondent has admitted that decree in O.S.No.195 of 1977 was inexecutable and has not produced bailiff's report to show the reason for inexecutability of the decree. The appellants are not in possession of the suit property and they are in possession of the property in Survey No.44, belonging to the Kanchipuram Municipality. The learned counsel for the appellants further contended that the suit is liable to be dismissed on the ground of resjudicata and raised following Substantial Questions of law:

"1. Whether the plaintiff had proven a case with respect to S.No.44 when the suit schedule mentions only S.Nos.45/1, 45/2 and 45/3?

2. Whether the Court below was correct in law in relying on the earlier suit in the absence of the decree in Ex.P2?

3. Whether the Courts below had omitted to see that the plaintiff had not discharged its burden of proving that the defendants were tenants of the plaintiff but presuming that the earlier suit O.S.No.195/1977 the defendants father was a tenant?

4. Whether the Court below transgressed the law of limitation and witnessed the scope of the suit by extending the non-execution of the earlier decree by not holding that issue was resjudicata?

5. Whether the Courts below erred in law to see that the dominus litis had an onus to prove that the property in the occupation of the defendants belonged to them when the contra plea was taken in the written statement by the defendants since the identity of the property has not been defined?"

8. Heard the learned counsel for the appellants and perused the materials available on record.

9. The contention of the learned counsel for the appellants

that the property under their occupation does not belong to the respondent, but it belongs to the Kanchipuram Municipality and the property under the occupation of the appellants is in Survey No.44. Further, the contention of the learned counsel for the appellants is that the suit is barred by limitation and principles of resjudicata. The respondent failed to prove that they are the owners of the suit property with clear boundaries. These contentions are without merits.

10.The respondent has let in oral and documentary evidence and proved that the suit property belongs to them. Earlier, the respondent had filed O.S.No.195 of 1977, which is not between the respondent and appellants and therefore, the said proceeding will not be resjudicata. Similarly, the contention of the learned counsel for the appellants that suit is barred by limitation as respondent has filed suit after 15 years of dismissal of A.S.No.31 of 2009 filed by the father of the appellants is also not correct.

11.The respondent has filed suit for possession, as appellants denied their title and claim that the property belongs to the Kanchipuram Municipality. None of the appellants had let in oral evidence and also did not produce any document to show that property belongs to the Kanchipuram Municipality. The Courts below have considered all the above facts in proper perspective and decreed the suit and dismissed the Appeal, filed by the appellants, by giving cogent and valid reasons. There is no error in the said judgment warranting interference by this Court. No question of law much less than the substantial question of law has arisen in this Second Appeal.

12.In the result, this Second Appeal is dismissed. No costs.

Sd/-

Assistant Registrar(CS V)

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Sub Assistant Registrar

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To

1.The Subordinate Judge, Kanchipuram.

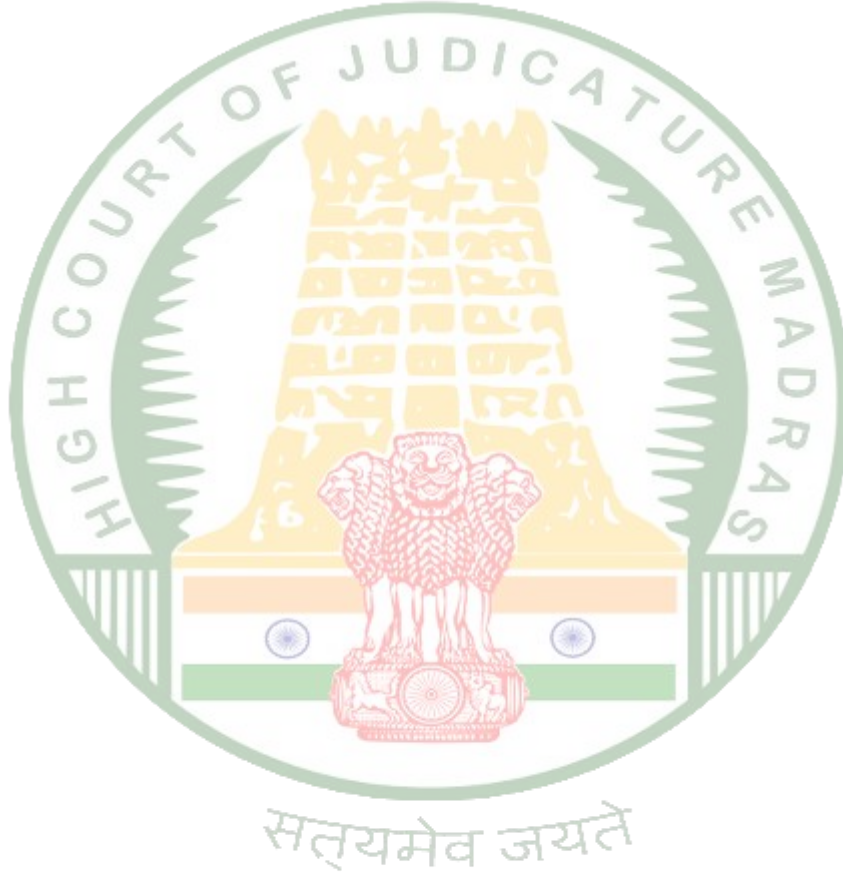
2.The Principal District Munsif, Kanchipuram.

3.The Section Officer,
VR Section,
High Court, Madras.

+1cc to Mr.Perumbulavil Radhakrishnan, Advocate sr.no.43278
+2cc to Mr.T.Jayaraman, Advocate sr.no.43734

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sj(co)
nr 09/08/2018



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