

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.07.2018

CORAM

THE HONOURABLE MR.JUSTICE HULUVADI G.RAMESH

S.A.No.406 of 2018

and

C.M.P.Nos.11245 and 11246 of 2018

R.Hemalatha ... Appellant/Appellant/Defendant

Vs

K.Mahendran ... Respondent/Respondent/Plaintiff

Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 31.01.2018 made in A.S.No.142 of 2017 on the file of the XVIII Additional City Civil Court at Chennai in confirming the judgment and decree dated 05.08.2016 made in O.S.No.2322 of 2013 on the file of the VIII Assistant City Civil Court at Chennai.

For Appellant : Mr.S.Prabhakaran, Sr.Counsel for
Mr.M.A.Gowthaman

For Respondent : Mr.M.L.Ramesh

JUDGMENT

The appellant herein is the defendant and the respondent herein is the plaintiff in the civil suit filed in O.S.No.2322 of 2013 on the file of the VIII Assistant City Civil Court, Chennai.

2.The respondent/plaintiff filed the suit in O.S.No.2322 of 2013 to direct the defendant to vacate and deliver vacant possession of the rear car shed portion, vacant land adjoining the car shed and one room in the first floor of the property situated at No.10, Pillaiyar Kovil Street, Velachery, Chennai-600042, more particularly described in the suit to the plaintiff and for a direction to pay a sum of Rs.25,000/- per month to the plaintiff towards damages for use and occupation of the above said areas, till the defendant vacates and delivers vacant possession to the plaintiff. The relief of permanent injunction was also made before the Trial Court.

3.After hearing both the parties, the Trial Court held that the plaintiff is entitled for recovery of possession as prayed for, and for other reliefs, the suit was dismissed, by order dated 05.08.2016. Challenging the same, an appeal was filed in A.S.No.142 of 2017 by the defendant. The Lower Appellate Court dismissed the appeal, by judgment dated 31.01.2018. Challenging the said judgment, the present Second Appeal has been filed by the appellant/defendant.

4.The learned senior counsel appearing for the appellant has submitted that the suit property has not been properly and correctly detailed in the plaint schedule and there is no basis for arriving at the value of the relief as Rs.2,00,000/- by the plaintiff. In the property in question, the appellant is in possession of a rear portion in the ground floor, which was wrongly described in the plaint as car shed which is only a room measuring about 150 sq.ft. The said fact has been admitted by the plaintiff himself in the plaint. The total extent as well as the linear measurements of the suit property is consciously absent in the plaint. He also submitted that the appellant cannot be termed as a trespasser in respect of the suit property. The defendant is in possession of the suit property from the time of her marriage with one K.Ramesh. She has every right and authority to continue to be in possession of the suit property. Stating so, he prayed for allowing this appeal and to set aside the orders passed by the Courts below.

5.The learned counsel for the respondent/plaintiff has submitted that both the Courts below have considered the matter in proper perspective and has passed the orders and hence the same does not require any interference in the hands of this Court.

6.Heard the learned counsel on either side and perused the materials available on record.

7.Even though the suit has been filed with a larger prayer, the Trial Court has given the relief to the plaintiff only in respect of recovery of possession. The reliefs of damages for use and occupation have been dismissed with costs. The order passed by the Trial Court has been subsequently confirmed by the Lower Appellate Court.

8.With regard to the ground taken by the appellant that some of the properties contained in Ex.A1 have been purchased by the appellant's father-in-law and that the co-sharers of the properties are not added as proper parties in the suit, it appears that there was a matrimonial dispute between the appellant and her husband one Mr.Ramesh, and a divorce petition filed against her has been dismissed, but the petition filed by

her for restitution of conjugal rights has been allowed. Aggrieved by the same, the said Ramesh preferred an appeal before this Court in C.M.A.Nos.2227 and 2228 of 2008 and in that appeal, this Court granted divorce. Thus, the marriage between them has been dissolved. Further, no appeal has been preferred against the said order before the Apex Court. Thus, she is not entitled to get any share in the undivided portion belonging to the said Ramesh, as she has been awarded a permanent alimony of Rs.2,50,000/- as full and final settlement. This is what the Lower Appellate Court has observed in the judgment impugned, which does not require any interference. Even with regard to the question as to whether a divorced wife is entitled to get share in her husband's undivided share in the ancestral property, it has been properly dealt with by the Lower Appellate Court, relying upon the judgment of the Hon'ble Supreme Court reported in 2005(8) SCC 140, holding that the defendant is not entitled to get any share in the undivided share of her husband-Ramesh.

9.Further, in respect of the contention that the suit has not been properly valued, the Lower Appellate Court has observed that even though the defendant filed a written statement, no petition has been filed under Section 12 of the Tamil Nadu Court Fees and Suit Valuation Act to decide the Court fee paid by the plaintiff.

10.The issue of res judicata has also been properly dealt with by the Lower Appellate Court. It was argued before the Lower Appellate Court that the plaintiff's parents have filed O.S.No.4090 of 2008 on the same cause of action, before the VI Assistant Judge for permanent injunction and the same was dismissed for default on 31.03.2009 and without restoring the same, the plaintiff filed O.S.No.2322 of 2013. In this connection, it was observed that no finding was given to any one of the issues raised in O.S.No.4090 of 2008 and it was only dismissed for default and hence the suit in O.S.No.2322 of 2013 is not hit by the principle of res judicata.

11.Thus, both the Courts below have given concurrent findings, which, in the considered opinion of this Court, does not call for any interference. In the result, the Second Appeal is dismissed. No costs. Consequently the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

KM

To

1.The IX Judge, Court of Small Causes, Chennai.

2.The X Judge, Court of Small Causes, Chennai.

+1cc to Mr.MA.GOUTHAMAN, Advocate, S.R.No.44686

+1cc to Mr.M.L.RAMESH, Advocate, S.R.No.44777

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and

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TR(02/08/2018)



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