

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.07.2018

Pronounced on : 02.11.2018

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.2114 of 2001

Thangammal ... Appellant/1st defendant

Vs.

1.V.Jagannathan1st Respondent/ plaintiff

2.Manickam ...2nd Respondent/2nd defendant

Prayer:- Second Appeal filed under Section 100 of C.P.C., to set aside the Judgment and decree dated 31.07.2001 in A.S.No.88 of 2000 passed by the Principal District Judge, Villupuram reversing the judgment and decree of the Subordinate Judge's Court, Kallakurichi dated 30.06.2000 in O.S.No.109 of 1996.

For Appellant : Ms.T.R.Gayathri
for M/s.Savabhauman Associates

For Respondents: Mr.R.Sunil kumar for R1
set exparte for R2
vide order dated 23.07.2018

J U D G M E N T

This second appeal has been filed by the first defendant against the judgment and decree passed by the Principal District Judge, Villupuram in A.S.No.88 of 2000 dated 31.07.2001 reversing the judgment and decree passed by the Sub-Judge, Kallakurichi in O.S.No.109 of 1996 dated 30.06.2000. The first respondent herein had filed a suit in O.S.No.109 of 1996 on the file of the Sub-Judge, Kallakurichi, to declare that he is the owner of the suit properties and to direct the defendants to deliver the suit properties to him. The learned Sub-Judge by the judgment and decree dated 30.06.2000 had dismissed the said suit without costs. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.88 of 2000 on the file of the Principal District Judge, Villupuram. The Principal District Judge, Villupuram, by the judgment and decree dated 31.07.2001 had set aside the judgment and decree passed by the trial court and decreed the suit as prayed for with costs. He also directed the defendants to deliver the suit properties within three

months. Feeling aggrieved, the first defendant had preferred the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

2. The averments made in the plaint are, in brief, as follows:

The suit properties are movable properties. The said properties were purchased by the plaintiff from one Anbumani on 24.11.1978 for Rs.35,000/- under a sale receipt. On 02.12.1981, an oral agreement was entered into between the plaintiff and the defendants and as per the terms of the said agreement, the plaintiff was running a Tourist Talkies viz., "Ganapathi Touring Talkies". The oral agreement was reduced into writing on 23.01.1984. As per the said agreement, the plaintiff and the first defendant jointly conducted the Touring Talkies, the second defendant was acting as the Manager of the said Touring Talkies. The 'C' form was in the name of the first defendant. Taking advantage of the same, the first defendant did not account for the profit and loss of the said Touring Talkies and acted against the terms of the partnership deed, as a result of which, the difference of opinion arose between the plaintiff and the first defendant. Hence, the plaintiff issued a notice to the defendants calling upon them to submit the accounts. The defendant Nos.1 and 2 had received the said notice and issued reply notices dated 28.10.1984 and 19.10.1984 respectively with false averments. Hence, the plaintiff was forced to file a suit in O.S.No.192 of 1985 against the defendants and the Collector of South Arcot, Cuddalore, before the District Munsif Court, Kallakurichi. In the meanwhile, the first defendant gave a false complaint against the plaintiff before the Kachirapalayam police station stating that the plaintiff has committed theft of the suit properties. Based on the said complaint, a case was registered in Cr.No.192 of 1986 in Kachirapalayam police station and during investigation, the suit properties were seized by the police and produced before the First Class Judicial Magistrate, Ulundurpet. The learned Judicial First Class Magistrate, Ulundurpet, returned the suit properties as interim custody to the first defendant on a bond. In the said case, charge sheet also has been filed and subsequently, it was transferred to the Judicial Magistrate, Kallakurichi and numbered as C.C.No.785 of 1990. The learned Judicial Magistrate, after full trial, acquitted the plaintiff in the said case. However, he directed the parties to approach the civil court and prove their ownership with regard to the suit properties. In the meanwhile, the suit which was filed in O.S.No.992 of 1985 on the file of District Munsif, Kallakurichi, was dismissed for default. Since the Judicial Magistrate, Kallakurichi, has directed the parties to approach the civil court, the plaintiff has filed the above suit for declaration and also for delivery of the suit properties.

3. The averments made in the written statement filed by the first defendant are, in brief, as follows:

It is false to state that the plaintiff had purchased the suit properties from one Anbumani. The first defendant's husband viz., Sitharthan had purchased the suit properties for Rs.28,600/- from one Anbumani under a sale receipt dated 03.02.1979. Subsequently, the said Sitharthan had sold the suit properties under a sale receipt dated 05.06.1981 to one Arthanari. Thereafter, the said Arthanari had sold the suit properties to the first defendant's son viz., Ravi under a sale receipt dated 31.01.1985. Therefore, the suit properties are absolutely belonged to the first defendant only and only with help of suit properties, the touring talkies was running. The plaintiff has not invested any amount for running the said touring talkies. It is true that the plaintiff had filed a suit in O.S.No.192 of 1985 on the file of the District Munsif and the said suit was dismissed for default. It is true that the criminal case was filed against the plaintiff before the Judicial Magistrate, Kallakurichi and the said case was disposed of, but the judgment passed in the criminal case will not bind upon the first defendant. The suit properties are absolutely belonged to the first defendant and the said properties are in possession of the first defendant. Therefore, the first defendant prayed to dismiss the suit.

4. The averments made in the written statement filed by the second defendant are, in brief, as follows:

It is true that the second defendant was acting only as a manager of the said "Ganapathi Touring Talkies", but the second defendant denied the allegation that there was an oral agreement between the defendants and the plaintiff on 02.12.1981 and subsequently, it was reduced to writing on 23.01.1984. The second defendant has been unnecessarily added as a party in the suit and therefore, he prayed to dismiss the suit with compensatory costs.

5. Based on the aforesaid pleadings, the learned Sub-Judge has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and also marked Exs.A1 to A6 as exhibits. On the side of the defendants, the first defendant was examined as DW1 and her husband was examined as DW2. On the side of the defendants, one exhibit was marked as Ex.B1. The Advocate Commissioner's report was marked as Ex.C1.

6. The learned Sub-Judge after considering the materials placed before him has dismissed the said suit by the judgment and decree dated 30.06.2000. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.88 of 2000 on the file

of the Principal District Judge, Villupuram. The learned Principal District Judge has allowed the said appeal and set aside the judgment and decree passed by the trial court and decreed the suit as prayed for with costs and also directed the defendants to deliver the suit properties to the plaintiff within three months. Feeling aggrieved, the first defendant has filed the present second appeal.

7. This court at the time of admitting the second appeal has formulated the following substantial questions of law:

1. Whether the lower appellate court is correct in law in misconstruing the evidence of DW's 1 and 2 as amounting to accepting the case of the 1st respondent plaintiff?

2. When the lower appellate court finds that the property description in Ex.A1 and the plaint are clearly different, whether it is correct in law in decreeing the suit for declaration and delivery of the properties on the basis of Ex.A1?

3. When the trial court has clearly found that there is neither oral nor documentary evidence to prove the case of the 1st respondent/plaintiff, whether the lower appellate court is correct in law in reversing the judgment and decree of the trial court without setting aside the said findings?

4. When it is axiomatic in law that the plaintiff has to succeed on the strength of his case and not on weakness of the adversary, whether the lower appellate court is justified in law in casting the burden upon the appellant/1st defendant to establish the case and in decreeing the suit by picking holes in the defence?"

8. Heard Ms.T.R.Gayathri for M/s.Savabhauman Associates, learned counsel for the appellant and Mr.R.Sunil kumar, learned counsel for the first respondent.

9. Substantial Questions of Law 1 to 4:

The learned counsel for the appellant/first defendant has submitted that the first appellate court erred in reversing the well considered judgment of the trial court. She further submitted that the first appellate court failed to consider that the plaintiff failed to prove that Ex.A1 is a genuine document. She further submitted that since the plaintiff has filed a suit for declaration, the burden is upon him to prove the title over the suit properties. She further submitted that the plaintiff cannot rely upon the weakness of the defendants' case. She

further submitted that the trial court has clearly held that the list of the properties mentioned in Ex.A1 do not tally with the description of the properties mentioned in the plaint schedule, but without considering the said fact, the first appellate court has decreed the suit by saying that the properties mentioned in the Ex.A1 and suit properties are one and the same. She further submitted that the first appellate court erred in relying upon the admissions made by the first defendant in her evidence before the criminal court and decreed the suit and therefore, she prayed to allow the second appeal and set aside the judgment decree passed by the first appellate court and restore the judgment and decree passed by the trial court.

10. Per contra, the learned counsel for the first respondent has submitted that the first defendant, while examining herself as PW2 in the criminal case, has categorically admitted that the suit properties were purchased in the name of the plaintiff and taking into consideration of the said admission, the first appellate court has rightly allowed the appeal which was filed by the plaintiff and decreed the suit as prayed for and in the said factual findings, this court cannot interfere and therefore he prayed to dismiss the second appeal.

11. It is an admitted fact that the plaintiff and the first defendant's husband are brothers and they had run a touring talkies viz., "Ganapathi touring talkies". It is also an admitted fact that the 'C' Form for running a tourist talkies stood in the name of the first defendant. It is also an admitted fact that after expiry of the license, the plaintiff removed the suit properties (projector, etc.,) from the touring talkies and kept in his house. Hence, the first defendant had lodged a criminal complaint before the police and based on the said complaint, the Sub-Inspector of Police, Kachirapalayam had registered a case against the plaintiff in Cr.No.192 of 1986 and during investigation, the suit properties were seized and produced before the criminal court. After investigation, a charge sheet was filed and based on the same, a case was taken on file in C.C.No.285 of 1990 on the file of the Judicial Magistrate, Kallakurichi under Sections 457 and 380 of IPC. The learned Judicial Magistrate, Kallakurichi, after full trial by the judgment dated 16.07.1993 had acquitted the plaintiff. Further, he ordered that the suit properties were already returned to the PW1 (Sitharthan and he can retain the same) and that if any dispute arises with regard to the said properties, the parties have to approach the civil court and get remedy. In pursuance of the said order, the plaintiff has filed the present suit.

12. In the said criminal case, the first defendant herein was examined as PW2 and her deposition has been marked as Ex.A6.

Perusal of Ex.A6 shows that she has admitted that the suit properties were purchased on 24.04.1978 in the name of the plaintiff herein. However, she has stated that the said properties were purchased from and out of the funds taken from the Theatre. So, it is clear that she has admitted that the suit properties were purchased on 24.04.1978 itself for Rs.35,000/- in the name of the plaintiff. Under the said circumstances, the contention of the first defendant that on 03.02.1979, her husband viz., Sitharthan had purchased the suit properties from the same vendor viz., Anbumani for Rs.28,600/- is not acceptable. As already stated that the first defendant in Ex.A6 has stated that the suit properties were purchased from and out of the theatre funds and in such a case, she should have produced the theatre accounts and prove that the suit properties were purchased from the theatre funds. But she has not produced the theatre accounts and prove the aforesaid fact. Taking into consideration of the aforesaid facts, the first appellate court has held that the contention of the first defendant that the suit properties were purchased from theatre funds cannot be accepted.

13. It is also to be pointed out that in the written statement, the first defendant has stated that the suit properties were purchased from the said Anbumani by her husband viz., Sitharthan under a sale receipt dated 03.02.1979 for Rs.28,600/- and subsequently, the said Sitharthan had sold the suit properties to one Arthanari on 05.06.1981. She further stated that her son viz., Ravi had purchased the suit properties from the said Arthanari under a sale receipt dated 31.01.1985. But she has not produced the receipt which stands in the name of her son dated 31.01.1985. On the contrary, she has produced only a receipt which stands in the name of her husband dated 03.02.1979 and marked as Ex.B1. Even as per her own statement, her husband had sold the suit properties to one Arthanari on 05.06.1981 and from the said Arthanari, her son had purchased the suit properties under a sale receipt dated 31.01.1985. In such a case, she should have produced the said sale receipt dated 31.01.1985 which stands in her sons name, but she has not produced the said sale receipt.

14. It is also to be pointed out that in the written statement, the first defendant has stated that since her son viz., Ravi had purchased the suit properties under a sale receipt dated 31.01.1985, she became absolute owner of the suit property. If her son had purchased the suit properties, her son alone can claim right over the suit properties but she claims that she is the absolute owner of the suit properties. The said contention is also against her own statement.

15. It is true that the trial court has held that the properties described under Ex.A1 do not tally with the suit properties, but the first appellate court has considered the said discrepancy and after referring to the Advocate Commissioner's report (Ex.C1) came to the conclusion that the properties mentioned under Ex.A1 and suit properties are the same properties. The first appellate court after considering the oral and documentary evidence came to the conclusion that the suit properties were purchased by the plaintiff and as such, he is entitled for recovery of the same. In the said factual findings, this court cannot interfere. Accordingly, the substantial questions of law are answered.

In the result, the second appeal is dismissed confirming the judgment and decree passed by the first appellate court. No costs.

Sd/-
Assistant Registrar(CS-III)

//True copy//

Sub Assistant Registrar

gv

To

1. The Principal District Judge,
Villupuram.
2. The Subordinate Judge's Court,
Kallakurchi.

+1cc to M/s.Savabhauman Associates, Advocate SR.No.75698

सत्यमेव जयते

S.A.No.2114 of 2001

CNR (CO)
GMY (19/03/2019)

WEB COPY