

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.02.2018

CORAM:

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.900 of 2017
and C.M.P.Nos.22757 and 22758 of 2017

1. S.Panneerselvam
2. S.Lingamoorthy .. Appellants/Appellants/Plaintiffs

Vs.

1. Kala
2. Naga
3. Ananthi
4. Arulmozhi
5. Selvi
6. Selvam
7. Selvakumar .. Respondents/Respondents/Defendants

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgement and decree dated 20.04.2017 passed in A.S.No.48 of 2015 on the file of the Subordinate Court, Vellore, confirming the judgement and decree dated 29.06.2015, in O.S.No.118 of 2013 on the file of the District Munsif Court, Katpadi.

For Appellants : Mr.S.V.Jayaraman, Senior Counsel
for Mr.J.Muthukumaran

For Respondents: Mr.S.Parthasarathy, Senior Counsel
for Mr.V.Kathikeyan

J U D G E M E N T

The plaintiffs are the appellants challenging the concurrent findings of the Courts below in a suit for permanent injunction.

2. The admitted facts in the suit are that the properties originally belonged to one Adimoolam, he having purchased the same on 17.09.1955. The said Adimoolam had three children, namely, Sambasivam, Govindasamy and Yamuna. The daughter Yamuna died long back. The plaintiffs 1 and 2 are the children of the said Sambasivam and defendants 1 to 4 are the children of Govindasamy and defendants 5 to 7 are the legal heirs of pre-deceased son of Govindasamy.

3. It is the case of the plaintiffs that a Will was executed by the grandfather Adimoolam on 29.01.1985 in favour of the plaintiffs, and that, they have been in continuous possession of the suit property and they had also dealt with the suit property, by mortgaging the same. Based on the above said averments, they are seeking the relief of permanent injunction, as the defendants tried to interfere with their peaceful possession.

4. However, the defendants denied the averments made in the plaint, though admitted the relationship between the parties. The ownership of the property by the grandfather Adimoolam is also admitted. It is the specific case of the defendants that there was an oral partition even during the lifetime of Adimoolam and the upper portion of the suit property was allotted to the father of the plaintiffs and the lower portion was allotted to the father and grandfather of the defendants 1 to 4 and 5 to 7 respectively.

4.1. The suit came to be filed including the property, that was allotted to the share of the defendants also. The defendants also had categorically denied the execution of the Will, as the Will had also included the portion, that was allotted to Govindasamy.

4.2. Even during the lifetime of the said Adimoolam, the properties were mortgaged and on his death, the mortgage was in subsistence. Even without discharging the said mortgage loan, plaintiffs claimed to have got the right over the suit property by way of the Will. In fact, it is the claim of the defendants that the first plaintiff, even without redeeming the earlier mortgage had again created an equitable mortgage with the Katpadi Co-operative Society, with respect to Survey No.324/1 and the same is also yet to be redeemed till date. The above conduct of the plaintiffs, according to the defendants, are fraudulent and the plaintiffs are trying to defeat and deny the rights of the defendants, who are also equally entitled to the share in the properties belonging to Adimoolam.

5. The plaintiffs have chosen to examine themselves as P.Ws.1 and 2 before the Trial Court, apart from examining P.Ws.3 and 4 and marking Exs.A.1 to A.15. The defendants examined D.Ws.1 to 3 and marked Exs.D.1 to D.12.

6. On the above pleadings and after considering the oral and documentary evidence, the Courts below have concurrently found that the plaintiffs have not established their possession and dismissed the suit.

7. The learned Senior Counsel appearing for the appellants/ plaintiffs furnished additional substantial questions of law contending that the injunction suit had been dismissed without

even deciding or determining the possession of the plaintiffs on the date of the suit.

8. Heard the learned Senior Counsel for the appellants/plaintiffs and the learned Senior Counsel for the respondents/defendants.

9. Admittedly, the properties belong to the grandfather of both the plaintiffs and the defendants. It is the case of the defendants that there was an oral partition, even during the lifetime of the original owner. It is also stated that there was a mortgage during the lifetime of the original owner, i.e., Adimoolam, which is said to have been redeemed by the defendants subsequently, and they have also produced documents to that effect. It is to be noted that the parties are co-owners.

10. The plaintiffs have laid their claim based on the Will alleged to have been executed by Adimoolam in their favour, which is dated 29.01.1985. Though it is claimed that it is a registered Will, curiously, the plaintiffs have not even produced the original Will before the Court and there is no just and convincing reasons put forth for non-production of the same. The defendants pointed out that 50 cents of their share in the lower portion of the property, which was allotted to them during the lifetime of Adimoolam, had also been included in the Will. Therefore, they had specifically denied the title of the plaintiffs.

11. When there is a denial of title and a cloud cast upon the title of the plaintiffs, the burden is on the plaintiffs to prove that they are the owners of the property and they are entitled for injunction based on their possession. In this case, first of all, the plaintiffs have not come up with clean hands, as they have not stated all the particulars in the plaint. The suit was filed only for bare injunction based on their right through the Will dated 29.01.1985. That being so, it is the bounden duty of the plaintiffs to prove the execution of the Will in the manner known to law. As stated earlier, even without producing the original Will before the Court, the said exercise of proof of the same is not possible. In the absence of the Will and when the plaintiffs have not admitted the partition, the parties are only co-owners of the property, having their right flowing from the grandfather.

12. It is settled principle that there cannot be an order of injunction against the co-owners. Even presuming that the plaintiffs are entitled to the upper 50 cents of the suit property, they have not put forth any evidence to show that they are in possession as on date. When they have not admitted the partition, as claimed by the defendants, injunction cannot be

granted even for the partitioned property, in the absence of possession of the same by the plaintiffs. When the exclusive right of the plaintiffs over the suit property is not established, the theory of possession follows title also cannot be applied.

13. In fine, in the absence of any merit in the substantial questions of law raised, the appeal deserves to be dismissed.

14. Accordingly, the Second Appeal is dismissed confirming the judgement and decree of the Courts below. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

gg

To

1. The Subordinate Judge,
Vellore.
2. The District Munsif Court,
Katpadi.

+1cc to Mr.J.Muthukumaran, Advocate Sr.No.13592
+1cc to Mr.V.Karthikeyan, Advocate Sr.No.12616

GJ(CO)
sm:7.3.2018

Judgement in
S.A.No.900 of 2017

सत्यमेव जयते

WEB COPY