

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.11.2018

CORAM:

THE HONOURABLE MR. JUSTICE N.SESHASAYEE

S.A.No.554 of 2008
and
M.P.No.1 of 2008

Muthulakshmi

...Appellant/Plaintiff

Vs

Sekar

...Respondent/Defendant

Prayer: Second Appeal is filed under Section 100 of C.P.C., against the judgement and decree of the Principal Sub-Court, Mayiladuthurai, dated 17.12.2007 made in A.S.No.39 of 2007 confirming the judgement and decree of the District Munsif Court, Sirkali dated 27.02.2007 made in O.S.No.125 of 2003.

For Appellant : Mr.S.Sounthar
For Respondent : Mr.A.Muthukumar

JUDGMENT

The plaintiff, who has lost successively before both the courts below in a suit for bare injunction, has come forward with this appeal before this Court. Parties would be referred to by their rank before the trial Court.

2.1 The brief facts are that the suit property belongs to a certain Abdul Razak Rauthar, under whom the plaintiff's father was a cultivating tenant. According to the appellant/plaintiff, on the demise of her father the tenancy devolved on all her children, of who only she has been cultivating the property as her other siblings chose to stay far away from the property. According to the appellant, her possession was threatened by the defendants, as a result of which she moved the Court for bare injunction.

2.2 In the written statement, the defendant would admit that the appellant's/plaintiff's father Ramakrishna Alwar was a cultivating tenant of the property under Abdul Razak Rauthar, but, he was the sub-tenant of Ramakrishna Alwar.

2.3 Before the trial court, the plaintiff did not choose to be in the box to complete her entire examination, and retreated

from the battle field midway through the litigious battle. She however, examined two independent witnesses in P.W.2 and P.W.3, both of who testified that the defendant had encroached into the suit property even prior to filing of the suit.

3. Both the Courts below have disbelieved the case of the defendant that he was a tenant under the plaintiff's father but all the same, they also relied on the testimony of P.W.2 and P.W.3 and held that inasmuch as the defendant has come into possession of the property even prior to filing of the suit, the plaintiff would not be entitled to the decree for injunction that she has sought. In the process of concluding thus, the courts below have also drawn adverse inference against the conduct of the plaintiff in not making herself available for cross-examination.

4. The appeal is yet to be admitted. Notice was served on the respondent and he has entered appearance.

5.1 Before this Court, the learned counsel for the appellant attempted to convince this Court that inasmuch as the defendant has admitted the tenancy of the plaintiff's father and given the fact that the courts below have rejected his case of sub-tenancy, necessarily, the suit must be decreed based on the facts proved in the case. Though normally the burden of proof rests on the plaintiff in proving her case, it is a situation where on the basis of facts which are already proved and made available on record, the Court can still grant a decree.

5.2 Expatiating his arguments, the learned counsel would submit that if the defendant is not a sub-tenant still it is required to be noted that the defendant has admitted the tenancy of the plaintiff's father, and this is the exact fact, both P.W.2 and P.W.3 would speak to. The plaintiff's father's right of tenancy has devolved on the plaintiff, and since the suit itself is for bare injunction, even other co-sharers having right over the tenancy need not be impleaded. These are the facts, the courts below have ignored.

6. Per contra, the learned counsel for the respondent/defendant would contend that the burden is squarely on the appellant/plaintiff, since the plaintiff has not established that she was in possession as on the date of the filing of the suit and since the facts proved indicates that the defendant has already entered possession of the property, suit for bare injunction would not lie.

7. On weighing the rival submissions, this Court finds merit in the case of the respondent/defendant. After all, this is a suit

for bare injunction and the plaintiff is required to establish before the Court that she is in actual physical possession of the property on the date of filing of the suit. When this is the moot point involved in the case, then the plaintiff's evidence becomes critical, but she has not shown enough character that law expects from her. It is not explained as to why she shied away from the witness box midway during the trial. Taking the entire facts and evidence in this case, this Court finds merit in the findings of the Courts below that in a suit for bare injunction in the manner sought cannot be sustained. Consequently, this Court finds no question of law much less any substantial questions of law arises for consideration in this Second Appeal. Having stated thus if the plaintiff requires recovery of possession, she is free to seek the same in the manner known to law.

8. Accordingly, this Second Appeal is dismissed, confirming the judgment and decree passed by both the courts below. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

ssn/prm

To

1. The Principal Sub Court, Mayiladuthurai.

2.The District Munsif Court, Sirkali.

3.The Record Clerk,VR Section, High Court, Madras.

+lcc to Mr.A.Muthukumar, Advocate, S.R.No. 77963

+lcc to Mr.S.Sounthar, Advocate, S.R.No. 77339

S.A.No.554 of 2008

and

M.P.No.1 of 2008

RK(CO)

GN(21/02/2019)