

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 06.12.2018

Judgment Pronounced on : 21.12.2018

CORAM : THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.607 of 2008
and M.P.No.1 of 2008

M.Valliammal ... Appellant/Respondent/ Defendant

Vs

1.J.Kiruthiga (Minor)

2.J.Theexiga (Minor)

(Minors are represented

by their Natural Guardianand

father R.Jagannathan) ... Respondents/Appellants/ Plaintiffs

(Respondents R1 & R2 declared as major and their father

and natural guardian R.Jagannathan is discharged from

the guardianship Vide order of the Court dated 13.11.2018

made in CMP.No.10795 & 10796 of 2018 in S.A.No.607/2008)

Prayer : Second Appeal filed under Section 100 of CPC against the judgment and decree passed by the III Additional City Civil Court, Chennai in A.S.No.328 of 2007 on 04.1.2008, reversing the judgment and decree passed by the XIV Assistant City Civil Court, Chennai in O.S.No.559 of 2004 on 11.1.2007.

For Appellant : Mrs.K.M.Valsala

For Respondents : Mr.P.Jayaprakasam

JUDGMENT

The defendant in O.S.No.559 of 2004 on the file of XIV Assistant City Civil Court, Chennai, which the respondents herein have instituted for recovery of possession of the suit property with mense profits, has come forward with this appeal challenging the decree of the first Appellate Court in A.S.No.328 of 2007. While the trial Court has dismissed the suit, the first Appellate Court has reversed the said decree, and decreed the suit. Parties would be referred to by their rank before the

trial Court.

2.1 The brief facts are :

- The suit property is described as a room measuring 18x10 sq.ft. in the ground premises of a building bearing door No.87/3, corresponding to the New Door No.10, Jones Road, Saidapet, Chennai. The admitted case of the parties is that the suit property was part of a larger extent of 2,780 sq.ft. and this property originally belonged to a certain Munusamy Pillai.
- Munusamy Pillai had six daughters and one son. This case chiefly concerns with Munusamy Pillai's only son Elumalai Pillai, his daughter Krishnammal and another daughter Duraikannu Ammal. The appellant/defendant is born to Krishnammal, and she has married her maternal uncle Elumalai Pillai.
- Be that as it may, one another daughter of Munusamy Pillai namely Nagammal had instituted a suit in O.S.No.4758 of 1979 on the file of XII Assistant Judge, City Civil Court, Chennai for partition. By then, Elumalai Pillai had passed away, and therefore his fractional 1/7th right in the suit property had devolved on his wife Valliammal and her children, and they were parties to the suit. On 07.04.1986, a preliminary decree came to be passed and thereafter, a final decree too was passed on 30.03.1993. The final decree is marked as Ext.A-4 in the present suit. During the pendency of this partition suit, on 24.08.1984, the defendant and her children had sold Elumalai Pillai's 1/7th share to one Govindarajan. This Govindarajan is the son of Duraikannu Ammal referred to earlier and necessarily the first cousin of the defendant.
- Subsequent to the passing of Ext.A-4 final decree in O.S.No.4758/1979, on 20.02.1997, some of the heirs to whom shares were allotted in O.S.No.4758/1979 had sold a total extent of 1,620 sq.ft. to one Selvaraj under Ext.A-5 sale deed, dated 21.02.1997.
- Selvaraj would now institute a suit in O.S.No.3095/1999 against the present defendant and her son and few others for recovery of possession. The defendant herein and her son had filed their written statement and contested the said suit. While so, on 17.02.2003, the suit in O.S.No.3095/1999 came to be dismissed for default [Ext.B-5 is the copy of the judgment]. Curiously enough, which though not very pertinent now, suit was dismissed for default, when it was posted for final arguments.

- During the pendency of O.S.No.3095/1999, Selvaraj, the plaintiff in the suit, had executed two sale deeds both dated 07.12.2000. One of the sale deeds is Ext.A-10, under which Selvaraj had sold an extent of 550 sq.ft. with specific boundaries to the present plaintiffs. The other sale deed is Ext.A-2, under which Selavaraj had sold, another portion to one Ravichandran.

2.2 The plaintiffs would now contend that on obtaining the sale of the suit property under Ext.A10, the plaintiffs have permitted the defendant to occupy the portion of the said property and now described in the plaint, and later when they requested the defendant to vacate the property, she refused to vacate the property. It is in this circumstance, the present suit was laid for recovery of property.

3. In the written statement, the defendant besides disputing the allegation of the plaintiffs that she is a permissive occupier of the suit property, has alleged that the present suit is hit by the decree passed in O.S.No.3095/1999. She has also pleaded that the description of the suit property is vague and not in conformity with Order VII Rule 3 CPC.

4. The case went for trial and before the trial Court, both sides have adduced oral as well as documentary evidence. On an appreciation of evidence, the trial Court decided to non-suit the plaintiffs, essentially on the ground :

- a) That the suit property is vague and uncertain in description and it is not in conformity with Order VII Rule 3 CPC
- b) That the suit is barred under Order IX Rule 9 CPC
- c) That the defendant is not a permissive occupier.

5. Aggrieved by the said decree, the plaintiffs have moved the first Appellate Court in A.S.No.328 of 2007 on the file of III Additional City Civil Court, Chennai. The first Appellate Court Vide its judgment now impugned has reversed the decree of the trial Court. Its line of reasoning are :

- a) That the exparte decree dismissing O.S.No.3095 of 1999, a copy of which is marked as Ext.B-5 will not operate as res judicata.
- b) That the suit property, inasmuch as its door number and street are candidly stated in the plaint, is adequately described and hence the suit cannot be dismissed under Order VII Rule 3; and
- c) That the defendant is a permissive occupier.

6. This appeal has not yet been admitted, and today both sides were heard. When the matter was taken up, the learned

counsel for the respondents would submit that the appellant had delivered vacant possession of the suit property, but this fact was disputed by the learned counsel for the appellant, who contended that she has instructions that the defendant/appellant continues to be in possession of the suit property. Hence, this Court proceeded to hear this appeal.

7. Primarily the arguments were heard on (a) if the suit is maintainable under Order IX Rule 9 CPC in view of the fact that the former suit filed by Selvaraj in O.S.3095 of 1999 was dismissed for default; and, (b) is the suit bad for the vague description of the suit property within the meaning of Order VII Rule 3 CPC.

8.1 The learned counsel for the appellant contended that in Ext.B-5, judgment in O.S.No.3095/1999, Selvaraj has described the entire property that he had purchased under Ext.A-5 as 'A-Schedule' property and has described the suit property therein as a room measuring 324 sq.ft. in the middle of the suit property, and he had given certain boundary description to the suit property. Admittedly, the present plaintiffs derive title under Selvaraj and he has described the suit property as a room measuring 18x10 sq. ft. with a specific door number. It is not the case of the plaintiffs that they have purchased some other property other than the one which Selvaraj had purchased under Ext.A-5. When Selvaraj claims that the defendant is in occupation of the specific 324 sq.ft., it is a mystery how this was reduced to 180 sq.ft., and hence locating it is of primary consideration. Hence, even if the finding of the first Appellate Court, as to the identity of the property is taken on its face value and presumed to be correct, still, if the suit property herein is compared with the suit property in O.S.No.3095 of 1999, an uncertainty creeps in if the entire evidence is read as a whole. Secondly, looking to the plaint description of the suit property alone, it does not provide enough description such as the survey numbers etc., to describe the suit property. Thirdly, if plaintiffs were to claim title only under Selvaraj and if defendant were to be in occupation of the portion involved in O.S.No.3095 of 1999, in the present suit the defendant ought to be in possession of the same property. Therefore, whichever way the suit is looked at, it cannot escape the consequences under Order VII Rule 3 CPC.

8.2 These apart, since the present plaintiffs are the pendente lite purchasers having purchased the property during the pendency of O.S.No.3095 of 1999, when the suit was dismissed, the decree passed therein binds him. In fitness of things, if at all the plaintiffs were desirous of seeking recovery of possession against the defendant, they ought to have had

O.S.No.3095/1999 restored to file. But the present strategy invoked by the plaintiffs in filing a fresh suit on the same cause of action is barred by Order IX Rule 9 CPC.

9. Countering the said arguments, the learned counsel for the respondents moved along the lines of the reasoning of the first Appellate Court. On the point of bar of suit under Order IX Rule 9 CPC is concerned, the learned counsel would argue :

a) That the plaintiffs was in dark about O.S.No.3095/1999 and had no opportunity of knowing that it had been dismissed too.

b) That the nature of title that the plaintiff in O.S.No.3095/1999 has pleaded is different from the one the present plaintiffs have pleaded, and therefore it cannot be said that the present suit is founded on the same cause of action, even though the relief sought may be the same.

10. Primarily, the defendant has not pleaded any of the aspects that her counsel has now canvassed. Neither the one founded on Order VII Rule 3 CPC, nor the one under Order IX Rule 9 CPC.

11. Before considering the rival submissions, it needs to be stated that while the defendant admits that a final decree has been passed in Ext.A-4 final decree, no where has she pleaded that the property which she is now in occupation is the one that was allotted to her share in the final decree, or that the property purchased first by Selvaraj under Ext.A-5 and then from him by the plaintiffs in Ext.A-10, was the same property allotted to her in the final decree. Hence, the burden is hers to state under what capacity she is in possession of the suit property. Her silence is no answer nor her sweeping denial its substitute.

12. Turning to the alleged vagueness or ambiguity in the description of the suit property, it is a finding of fact, and the first Appellate Court has held that the building involved in the suit is described in terms of its door number, and that this adequate enough description within the meaning of Order VII Rule 3 CPC. This Court is satisfied with the said finding.

13. Next to the argument founded on Order IX Rule 9 CPC. Order IX Rule 9 provides that in all cases where a suit is dismissed (for default) under Rule 8, a fresh suit on the same cause of action is barred. Here the suit in O.S.3095/1999 is fundamentally different from the present one in that the title under which the suit was laid is different from the one before this Court now: That suit was laid on the allegation that the

defendant was a tenant, and the present suit was laid on the ground that the defendant is a permissive occupier. If the phrase cause action is understood as a bundle of facts which the plaintiff is required to establish for his success in the suit, then the title under which he litigates becomes an inseverable aspect of the cause of action. With the title differing in both the suits, the presents suit row itself to safety as it is not affected by Order IX Rule 9 CPC.

14. In the result, the appeal is dismissed and the judgment and decree passed by the III Additional City Civil Court, Chennai in A.S.No.328 of 2007 on 04.1.2008, reversing the judgment and decree passed by the XIV Assistant City Civil Court, Chennai in O.S.No.559 of 2004 on 11.1.2007, is hereby confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

ds

To

1. The III Additional Judge,
City Civil Court, Chennai.
2. The XIV Assistant Judge,
City Civil Court, Chennai.
3. The Section Officer,
V.R.Section, High Court, Madras.

+1 cc to M/s.K.S.Kumar, Advocate Sr.No.89356

Judgment in
S.A.No.607 of 2008

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