

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.08.2018

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

CMA.No.343 of 2018
and CMP.No.3385 of 2018

Madheswari

... Appellant/Petitioner

Vs.

1.K.Padmavathi
2.Chinnathayammal
3.Indira Gandhi
4.Shanthi
5.Kamala
6.Sakthivel Murugan
7.Shankar

... Respondents/Respondents

Prayer : Civil Miscellaneous Appeal filed under Order 43 Rule 1 of CPC, to set aside the judgment and decree dated 19.12.2016 in R.E.A. No.48 of 2012 in R.E.P.No.45 of 2011 in O.S.No.52 of 2005 on the file of the III Additional District & Sessions Court, Salem.

For Appellant : Mr.K.Selvaraj

For Respondents : Mrs.Hema Sampath, Sr. Counsel
Assisted by Ms.Meenal [R1]

JUDGMENT

1. The appellant herein is a certain Madheswari. She had moved the Execution Court, (Fast Tract Court-II, Salem and later III Additional District Court, Salem) with an application in R.E.A.No.48/2012 for registering her obstruction for the intended delivery of the suit property involved in R.E.P.No.45/2011, under Order XXI, Rule 97 CPC. Vide its order dated 19.12.2016, the Execution Court has dismissed the said application, Hence, Madheswari has come forward with the present appeal.

2. In order to appreciate the setting in which Madheswari had moved the application, one may have to go back in time and should appreciate the facts on the basis of which the suit itself was laid and what followed thereafter:

- According to Padmavathy, the first respondent herein (plaintiff in the suit), the suit properties and other items of properties, were the joint family properties of the sons of one Vaiyapuri Gounder and another Sengoda Gounder. Presently we are concerned only with the branch

of Vaiyapuri Gounder.

- Vaiyapuri Gounder was married firstly to one Chinnammal and thereafter to Vellayammal. On 20.02.1956, both these wives of Vaiyapuri Gounder entered into a partition wherein the present property involved in the litigation was jointly allotted to Vellayammal, and her five sons. Of them Lakshmanan and Adappan have attained majority then.
- While so, the property which concerns this litigation is in Survey No.79 of Periyeri Village, Salem District. This property was developed into a layout and sub-divided. The developers/owner of the layout sold the plots to strangers. On 05.3.1974, they sold two plots admeasuring 2,800 sq.ft. Each, comprised in Survey Nos.79/42 and 79/43 respectively, to one Manickavasagam and another Nagarathinam Ammal.
- On 28.08.1980, both these purchasers of the aforesaid plots had sold their respective plots in Survey Nos.79/42 and 79/43 to one Padmavathy and another Mohan Kumar. To state it differently, Padmavathy (the first respondent herein) became entitled to the plot in No.79/42 and Mohankumar came to own the plot in S.No.79/43.
- On 31.08.1981, Mohan Kumar sold a part of his property measuring an extent of 700 sq.ft. to Padmavathy. Thus, Padmavathy came to own a total extent of 3,500 sq.ft. spread over S.No.79/42 and S.No.79/43 part.
- The plot that Padmavathy owned and possessed was lying as a vacant plot. While so, she faced interference with her possession from respondents 2 to 6 herein, who are the heirs of Adappan. Consequently she laid a suit in O.S.No.430 of 2000 on the file of District Munsif Court, Salem, for permanent injunction, seeking to restrain defendants 1 to 5 (respondents 2 to 6 herein) from interfering with her peaceful possession. However, these defendants came to occupy the property unlawfully, which necessitated Padamavathy to amend the prayer to one of mandatory injunction. Later, it was felt expedient that a suit for declaration of title and recovery of possession be laid, and accordingly, suit in O.S.No.430 of 2000 was withdrawn, and the suit in O.S.No.52 of 2005 was laid for declaration of Padmavathi's title and for recovery of property.
- O.S.No.52 of 2005 was contested by the defendants therein (to repeat respondents 2 to 6 herein). On 19.12.2006, the suit came to be decreed. Aggrieved by this, defendants have preferred A.S.No.411 of 2007 and it came to be dismissed on 21.3.2011. The plaintiff had filed a cross appeal for cost in A.S.No.465 of 2008 and that came to be allowed.

- The decree passed in O.S.No.52 of 2005 having become final, the plaintiff had laid R.E.P.No.45/2011 for delivery of the property. Challenging this execution petition, the present appellant has come forward to register her obstruction in R.E.A.No.48 of 2013, which, as indicated in the opening paragraph of this order was dismissed, giving raise to this appeal.

3. In her affidavit filed in support of her application in R.E.A.No.48 of 2013, the appellant/petitioner would allege that she is one of the daughters of Adappan, that she along with her mother and other siblings have been in possession of the suit property from 1972, that with their funds they have put up a shed which was leased out for a workshop, and later the appellant and her mother (2nd respondent) were doing milk vending business in the same. On either side, they have put up two more sheds which are being let out to workshops besides which they have put up three other shop building. It is further alleged that Padmavathi's vendors have created sale deeds as if her father Adappan had executed the same and has also inserted a false recital that possession has been given in 1974. That the suit which Padamavathi had laid in O.S.No.52 of 2005 was founded on this false premise and hence the entire decree is bad. Further, the appellant/petitioner though a daughter of Adappan was not made a party to the suit. The decree passed in O.S.No.52 of 2005 is fraudulent and non-est in the eye of law. At any rate, the alleged title of Padmavathy was lost under Section 27 of the Limitation Act.

4. In her counter, the first respondent chiefly narrated all the facts that have been stated herein above in Paragraph 2, and accused the appellant is attempting to hoodwink the Court.

5. Before the Execution Court, neither side produced any evidence. On appreciating the materials before it, the Execution Court dismissed the appellant's petition in R.E.A.No.48/2012.

6. The learned counsel for the appellant made a solitary submission that the appellant possessed enough documents to substantiate what she alleges, and that an opportunity be given to her. More particularly, he pointed out that the petitioner, though one of the children of Adappan was not impleaded in the suit, and technically the decree passed in the suit would not bind her.

7. Refuting the arguments of the learned counsel for the appellant, Mrs.Hema Sampath, learned Senior Counsel appearing for the first respondent pointedly brought to the notice of the Court that even before the Execution Court, the the appellant had given up her right to produce evidence and that she has taken a conscious decision through her counsel forfeiting her

right to produce evidence when the latter filed a memo into the Court, and this cannot be revived. In fact, argued the learned counsel, in paragraph No.8 of the order, the Execution Court has recorded this fact. This apart, it is a case where, if at all any, the present appellant raises identical contentions that her alleged co-sharers of the property (the respondents No.2 to 6) have raised in the suit. With nothing new to the pleading, the appellant attempts to open a gateway for her to agitate the same issue all over again, and this is both vexatious and also constitutes gross abuse of judicial process. The present application as well as the present appeal that followed it, are only efforts to delay respondent's right to enjoy the fruits of the decree she had obtained.

8. At rightly contended by the respondent's counsel, paragraph No.8 of the impugned order narrates how the appellant has waived all her right to produce evidence to substantiate her allegations. And what is significant here is, that the appellant herein does not claim any right or title independent of that which respondents 2 to 6 have claimed in the suit. And their core defence was founded on their allegation that Adappan had not participated in the sale deed of the year 1974. Even if it is presumed that the appellant had an independent right to resist execution of the decree passed in O.S.No.52 of 2005, yet unless she establishes that the sale deed executed in 1974 is invalid in 2012, she cannot challenge the title of the first respondent. Therefore, it all boils down to one of establishing possession on a better title than the respondent, and as already held, the appellant has not established the same. It is apparent that the present appellant has been set-up by respondents 2 to 6 to resist delivery of possession.

9. In conclusion, this appeal is devoid of merits and hence it is dismissed with costs. Consequently, connected miscellaneous petition is closed.

Sd/-

सत्यमेव जयते
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To:

1.The III Additional District and Sessions Judge, Salem

Copy to:-The Section Officer, VR Section, High Court, Madras.

+1cc to Mr.K.Selvaraj, Advocate SR.NO.56964

SSI(CO)

sm:24.10.2018

CMA.No.343 of 20186.08.2018